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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1967

JOHN FUNEL, Petitioner

VS.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX CONTAINING ALL OPINIONS AND JUDGMENTS DELIVERED BY UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS

Ellis C. Irwin

Joseph W. Nelkin

801 Baronne Building
305 Baronne Street
New Orleans, Louisiana
70112
Attorneys for Petitioner

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APPENDIX

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Fifth Circuit (Record, infra, Pps. 793 to 801) reported at 383 F. 2d 42:

(Pps. 793 to 801)

"WISDOM, Circuit Judge: The diversity

case, arising under the Louisiana Direct Action Statute,[1] concerns an industrial accident which occurred in Cameron, Louisiana, in 1961. The jury returned a verdict in favor of the plaintiff, John Funel, in the amount of $75,900.[2] The insurance company appeals, urging among other grounds that the trial court should have upheld its plea of prescription and that the court erred in admitting certain hearsay evidence. These contentions present nice questions of law, but we do not reach them. We reverse because there was no evidence of the defendant's negligence.

The trial below was not an ordinary one. On the question of liability there were only three witnesses—Funel, Fred Duhon, an employee of the plant where the accident occurred, and an insurance ad-

juster. Funel was the only witness to testify that the accident occurred. Duhon testified that Funel offered him a bribe to tell anyone who should inquire that an accident had in fact taken place. In rebuttal, the insurance adjuster testified that in a routine interview after the alleged bribe attempt Duhon did not mention the incident.

The accident occurred in the course of the construction of an ice plant. Funel, a sales engineer for the Equitable Equipment Company, had sold the refrigeration and other necessary machinery to the Steed Ice Company, the owner of the plant. The defendant's insured, Acme Refrigeration Company, had the contract to install the machinery while another outside contractor had the contract to construct the building to house it. Funel worked with the owner and the contractors as a general trouble-

shooter.

The accident occurred as the project neared completion. According to Funel's testimony, one of Acme's employees, Lionel Moore, asked him to come into the ice bin to take a look at a problem. The only way to enter the bin was to crawl over some machinery, turn around, and climb down onto a board which had been placed longitudinally between two parallel ice-moving corkscrews. Funel had entered the bin innumerable times by this method and had always found the board sturdy. This time, however, the board twisted and Funel fell, striking his knee on one of the corkscrews.

Funel testified that the screws had been in place for four to six weeks and that the board had simply been placed atop them. Because of the frequent passage of workmen

over the board, it had become wedged between the screws, so that it was quite steady. This was its condition the night before the accident.

The morning of the accident someone removed the board in order to work on the screws. That person or someone else then replaced it in its original position. The only evidence concerning the replacement of the board was Funel's testimony that after the accident, More told him that he (Moore) had put the board back.[3] There was no other testimony as to Acme's negligence.

At the close of the plaintiff's evidence and again after all the evidence had been presented, the defendant moved for a directed verdict on the ground that Funel had failed to prove negligence on the part of Acme. The defendant renewed this

objection in its motion for a judgment notwithstanding the verdict. The district court denied all three motions.

We have examined the record thoroughly. Viewing the evidence in the light most favorable to the jury's verdict, Funel proved only two things. First, at some time during the morning of the accident, an Acme employee replaced the board after it had been removed. Second, an accident occurred when Funel stepped on the board. The evidence fell far short of proving that Acme was negligent. There was no proof of the manner in which Moore replaced the board. There was no proof when he did so or that no one had moved it subsequently. Cf. Terrill v. ICT Ins. Co., La. Ct. App. 1 Cir. 1957, 93 So. 2d 292. There was no proof that Moore knew or should have known that the board was unstable. In fact Funel

testified (1) that other workmen were in the bin, apparently having used the board without incident, and (2) that the board looked all right to him.

In this diversity case we are, of course, bound to follow Louisiana negligence law. Although the law is governed by Articles 2315[4] and 2316[5] of the Civil Code, the requirements for proving negligence are basically the same as in a common law jurisdiction. The plaintiff has the burden of proof. He must prove fault. Brown v. Liberty Mutual Ins. Co., 1958, 234 La. 860, 101 So. 2d 696. He must prove that his injury resulted proximately from the defendant's fault. See, e.g., New Orleans & N.E.R.R. v. McEwen, 1897, 49 La. Ann. 1184, 22 So. 675. Negligence is not presumed from the mere happening of an accident. See Morales v. Employers

Mutual Liability Assurance Corp., 1943, 202 La. 755, 12 So. 2d 804; Day v. National U.S. Radiator Co., 1961, 241 La. 288, 128 So. 2d 660. 'It is the duty of the plaintiff to prove negligence affirmatively...' Morales v. Employers Mutual Liability Assurance Corp., supra, 12 So. 2d at 808.

The evidence here can support neither a direct finding of negligence nor the application of the doctrine of res ipsa loquitur. Funel offered no evidence to show that Moore or any other Acme employee failed to use due care in replacing the board. He proved only that Moore replaced the board. Funel offered no evidence to show that the manner in which Moore replaced the board caused the accident. He proved only that the accident occurred subsequent to Moore's replacing the board. Funel

offered no evidence that some intervening force had not caused the board to become unstable. In short, Funel offered no evidence whatsoever to show the breach of a duty or proximate cause.

Similarly, there was insufficient proof to call into play the res ipsa loquitur doctrine. There was no evidence to show that Acme had exclusive control of the board or of the premises, or that this was the sort of accident which does not occur in the absence of negligence. Res ipsa applies when the proof allows 'no room for a different presumption...' Morales v. Employers Mutual Liability Assurance Corp., supra, 12 So. 2d at 808. 'The rule will not be applied where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons

or causes, one of which was not under the management and control of the defendant.' Pilie v. National Food Stores of Louisiana, Inc., 1963, 245 La. 276, 158 So. 2d 162, 164.

Here any number of factors independent of Acme's control might have caused the accident. Employees of the plant owner or of the building contractor may have tampered with the board after Moore replaced it. Something may have fallen on it. Or Funel may simply have stepped on it in an unusual way.[6] The plaintiff apparently recognized the weakness of this argument, for although he pitched his cause in terms of res ipsa, he did not explicitly invoke the doctrine. The court did not charge the jury on it.

Funel seems to have relied below on the theory that the owner or occupier of

property has the duty to warn invitees of unsafe conditions which are not readily apparent. We do not reach the question whether Louisiana would apply that principle to a construction site where, of course, unsafe conditions abound. The defendant's insured was not an owner or occupier of property. Acme was merely a contractor, working with other contractors, on premises owned and occupied by another. Furthermore, there was no evidence whatsoever that Acme or any of its employees knew or should have known that the board was unsafe.

We hold that reasonable men could not conclude from the evidence in this record that Acme had been negligent. The district judge should have granted the defendant's motions for a directed verdict. We therefore REVERSE the

judgment of the district court and RENDER judgment in favor of the defendant.

Footnotes:

1) LSA-RA, Section 22:655.

2) The verdict was later reduced to $50,000, the limit of the insured's policy with the Fidelity and Casualty Company of New York.

3) It was to this testimony that the defendant objected on the ground it was hearsay. The district court held that Moore's statement did not fall within the res gestae exception to the hearsay rule, but that it was a vicarious admission against Acme's interest, and could come under that exception.

The defendant contends here that Louisiana law governs the admissibility of this evidence, because the question is really one of agency rather than of evidence. We disagree. This Court has taken the position that Federal

Rules of Civil Procedure 43(a) governs the admissibility of evidence in federal courts, and that the Rule should be interpreted to favor the admissibility of the evidence. Monarch Ins. Co. v. Spach, 5 Cir. 1960, 281 F.2d 401; Dallas County v. Commercial Union Assurance Co., 5 Cir 1961, 286 F.2d 388; Hambrice v. F.W. Woolworth Co., 5 Cir. 1961, 290 F.2d 557. The Supreme Court's decision in Hanna v. Plumer, 1965, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8, supports our conclusion that federal law rather than state law should govern. See also the excellent discussion in Comment, Federal Rule 43(a); The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine, 62 Colum. L.Rev. 1049 (1962).

We note, without deciding, that there is a strong argument that Moore's declaration

was not hearsay at all. Moore was present during the entire trial and was therefore available for cross examination. Because the exclusion of hearsay is in large part based on the lack of an opportunity to cross examine, there is little reason to classify as hearsay an extrajudicial declaration made by one who is physically present and available for cross examination during the trial. See American Law Institute, Model Code of Evidence, Rule 503 (b) (1942); Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 767-68 (1961).

While the plaintiff had the same opportunity to call Moore as did the defendant, the problem seems to be one of the assigning the burden. Rule 43(a)'s presumption in favor of admissibility casts the burden of calling the declarant upon the party making the

hearsay objection.

4) Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

5) Art. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

6) This case is analytically similar to one branch of the Pilie case, supra. There the plaintiff proved that employees of the Coca-Cola company had stacked a display in a supermarket and that the following day several cartons of bottles fell from the display injuring her. The Court of Appeal held that because there was no proof that the Coca-Cola employees had acted negligently and because so many other factors could have led to the display's instability, the defendant was entitled to a directed verdict. La. Ct. App. 1 Cir.

1962, 148 So. 2d 391, aff'd, 1963, 245 La. 276, 158 So. 2d 162."

The ruling of the United States Court of Appeals for the Fifth Circuit denying petitioner's application for a rehearing found in Record, infra, Pp. 831 is as follows:

(Pp. 831)

"You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith."

The judgment on the merits of the United States District Court for the Western District of Louisiana pursuant to the jury finding is found in the Record, infra Pp. 652 and is as follows:

(Pp. 652)

"JUDGMENT

This action came on for trial before a jury, and the issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED

that the plaintiff, John Funel, recover of the defendant, Fidelity & Casualty Company of New York, the sum of Fifty Thousand and No/100 Dollars, with interest thereon at the rate of five percent (5%) as provided by law; and his costs of action.

Dated at Lake Charles, Louisiana, this 26th day of January, 1965.

/s/ Edwin F. Hunter, Jr.
United States District Judge

Filed January 27, 1965
Alton L. Curtis, Clerk
U.S. District Court
Western District of Louisiana"

The opinion of the United States District Court for the Western District of Louisiana which was rendered pursuant to defendants' motions for judgment notwithstanding the verdict set forth in Record, infra Pp. 661-666, is as follows:

(Pp 661-666)

"HUNTER, JUDGE:

Alleging that permanent and disabling injuries resulted from the proximate negligence

of Acme Refrigeration Company, plaintiff, utilizing Louisiana Direct Action Statute, brought this action against Acme's liability insurer, Fidelity and Casualty Company of New York.

The case was tried to the jury and resulted in a verdict by the jury in favor of plaintiff and against defendant in the sum of $75,900.00. This amount was reduced to $50,000.00 because that was the extent of coverage.

At the close of plaintiff's case defendant filed a motion for a directed verdict. Defendant filed a similar motion at the close of all the evidence. These motions were denied and the case submitted to the jury. Subsequent to the verdict, defendant filed a timely motion to grant defendant a judgment notwithstanding same and/or a new trial.

The law applicable is well established and multiplying authorities would be superfluous. It may be summarized: The fact-finding power belongs to the jury. This power includes the determination of all questions of fact, and the drawing or rejection of inferences from facts. Both negligence and proximate cause are for the jury to find or reject, and the findings of the jury are not to be disturbed wherever they rest upon some evidence, or upon a reasonable inference or conclusion based upon some evidence. Neither conflicting evidence nor conflicting inferences are to be re-weighed or considered by the trial judge in testing the verdict. The sole question in testing the verdict is whether there is any evidence in the record, or any reasonable inference from any evidence in the re-

which, if believed, would authorize a verdict against defendants.

Defendant energetically and earnestly contends that there is no evidence of proximate negligence on its part. We disagree.

Testing the evidence as we must, with all inferences most favorable to the jury verdict, we find that there was evidence which presented a jury issue as to proximate negligence on the part of Acme. This evidence consisted of testimony on the part of plaintiff as to the responsibility of Acme, and the testimony of plaintiff as to the admission of Moore, an employee of Acme, as to Moore's activities relative putting in place the plank.

The Court appreciates the clear distinction between its power to grant a judg-

ment n.o.v. and its power to grant a new trial. The evidence here was certainly not overwhelming, but the question is: Was the verdict clearly or decidedly against the weight of the evidence? I do not think so. I am not free to re-weigh the evidence and set aside the verdict and grant a new trial merely because I might feel that other results would have been more reasonable.

The very serious issue raised by defendant's motion is whether this Court committed error in permitting Funel to testify that Lionel Moore, an employee of Acme, told him immediately after the accident that he, Moore, was the party who placed the faulty board in its position on the very morning of the accident. Absent this testimony, plaintiff presented no issue for the jury.

This was not an ordinary trial. Plaintiff called one witness, the plaintiff himself. Plaintiff's testimony included his version of the Moore admission. Defense counsel called only one witness, Fred Duhon, whose testimony was substantially that of his handwritten statement, to-wit:

> 'John Funel come to me on the Job and aske me if I would like to make a couple of 1000 dollars or more I answered him why of course any one would like to make money. he said all you have to do is tell any one who comes and askes you if any one got hurt here to say yes. I told him no. I would not lie for him or any one.'
>
> 'Fred Duhon'[1]

Lionel Moore, the man who allegedly made the admission, was present in the witness throughout the trial. No one called him.[2]

Did the Court err in letting Funel testify as to what Moore, an employee of

of Acme, said relative his, Moore's activities?

Defendant relies heavily upon Vicksburg and Meridian R.R. Co. v. O'Brien, 119 U.S. 99, 7 S.Ct. 172 (1886). That case, with four dissents, has been eroded over the years and cannot today be regarded as a statement of contemporary law. See Judge Morris' discussion in Martin v. Savage Truck Line, Inc., 121 F.Supp. 417; Grayson v. Williams, 256 F. 2d 61. We think that the statement of Moore made to Funel was admissible as an admission against interest. Wabisky v. D.C. Transit System, Inc., 305 F.2d 317; Koninklijke Luchtvaart Maatschappij NV KLM Royal Duch Airlines Holland v. Tuller, 110 U.S. App. D.C. 282, 292 F. 2d 775, cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed. 2d 136 (1961). See

McCormick, Evidence, Sect. 244 at 517-19 (1954). Also see La. & Ark. R.R.Co. v. Johnson, 214 F.2d 290 (5 Cir. 1954).

Defendant's motion to set aside the Court's instructed verdict in favor of Casualty Reciprocal Exchange should also be denied. The record is devoid of any evidence showing any negligence on the part of Dyson Lumber Company, 3rd party defendant's insured.

For reasons stated, the Clerk will enter forthwith an Order denying defendant's motions.

THUS DONE AND SIGNED at Lake Charles, Louisiana on this the 9th day of September, 1965.

/s/ Edwin F. Hunter, Jr.
United States District Judge

Filed September 10, 1965
Alton L. Curtis, Clerk
U. S. District Court
Western District of La.

Footnotes:

1) The above language is copied from Funel Exhibit 17, which is in essence the testimony of Mr. Duhon.

2) Counsel for plaintiff subsequently tried to call Moore in rebuttal. Defense counsel objected and the objection was sustained. This ruling was made necessary by the fact that there was nothing to rebut. Defendant had called only one witness, and his only testimony concerned the plaintiff's approaching him as a witness. However, counsel for plaintiff did make an offer of proof which appears at pages 368-369 of the record. The essence of this offer was that Moore, if permitted, would have testified that he invited plaintiff into the vault without notifying the plaintiff of the substantial changes which had taken

place in the vault, and that the plaintiff did step upon the plank, did fall to the floor, whereupon Moore assisted the plaintiff and admitted to the plaintiff that he, Moore, did place the board in question on the twin-screw conveyor on the morning of the accident."